For the reasons given I would allow the appeal. The order of acquittal is set aside. Pursuant to section 266(c) of the Criminal Procedure Code I find the respondent guilty of the first count and convict him accordingly. Although contributory negligence is no defence in a criminal charge, nevertheless it is a mitigating factor which should be taken into consideration in assessing sentence. In this case the deceased was not at fault at all. He was knocked down while proceeding on his side of the road. The negligent act of the respondent which caused the death of the deceased showed callousness on the respondent's part as regards risk to which others using the road were exposed. The severity of sentence should depend on the degree of callousness which was shown by the respondent. I sentence the respondent to four months' imprisonment. Further, in the exercise of my revisionary powers I would set aside the order of disqualification and substitute an order of disqualification from holding a driving licence for a period of one year.

Appeal allowed.

ONG TIAW KOK & ANOR. v. BIAN CHIANG BANK LTD.

[O.C.J. (B.T.H. Lee J.) November 12, 1971]

[Kuching — Civil Suit No. K. 34 of 1968]

Banking — Contract — Loan by a bank — Charge on land — Whether borrower had assented or acquiesced to charging of compound interest — Whether there was agreement for partial releases of land — Estoppel by conduct — Accounts.

The plaintiffs had been granted a loan in order to start a housing enterprise. They executed a charge for the sum of $110,000 in favour of the defendant bank at a monthly interest of 9.6% *per annum*, giving by way of security a charge on certain lands belonging to them. Subsequently they executed another charge upon security of the land for the sum of $440,000 at the interest set out in the charge. They claimed a declaration that they were entitled to have released from the said charges by the defendant the lots of land under the said charges upon payment of $8,000 for each lot, a further declaration that the rate of interest chargeable by the defendant should be 9.6% *per annum* and calculated at monthly rests and an account of the interest overcharged by the defendant.

The defendant bank alleged that the plaintiffs had agreed to pay or acquiesced in the payment of compound interest. The defendant also denied any agreement for partial releases of the land, and contended that even if there was such an agreement, it was unenforceable for lack of consideration.

Held: (1) the plaintiffs had never agreed to or acquiesced in the payment of compound interest and therefore the defendant bank was not entitled to charge such compound interest;

(2) although there was no consideration for the agreement for partial releases of the land, the promise of the defendant to give such partial releases had in fact been acted upon by the plaintiffs and therefore was binding on the defendant;

(3) in the circumstances there must be an inquiry to determine the amount of interest overcharged by the defendant bank.

Cases referred to:-

(1) *Majumder* v. *Attorney-General of Sarawak* [1969] 1 M.L.J. 132 at p. 134.

(2) *Moore & Ors. Assignees of Sheath & Ors.* v. *Voughton* (1816) 1 Start 487; 171 E.R. 538.

(3) *Dawes* v. *Pinner* (1801) 2 Camp. 480.

(4) *Re Williams* (1869) I.R. 3 Eq. 346.

(5) *Eaton* v. *Bell* (1821) 5 B. & Ald. 34; 106 E.R. 1166.

(6) *Williamson* v. *Williamson* (1869) L.R. 7 Eq. 542; 20 L.T. 389.

(7) *Spencer* v. *Wakefield* (1887) 4 T.L.R. 194.

(8) *Ferguson* v. *Fyffe* (1841) 8 Cl. & Fin. 121, 140; 8 E.R. 49.

(9) *Overseas Chinese Banking Corporation* v. *Tan Cheng Hoe* [1967] 1 M.L.J. 98.

(10) *Mahomed Salleh* v. *Nacodah Merican* (1889), 4 Ky. 463.

(11) *Brooks & Co.* v. *Blackburn Benefit Society* (1884) 9 App. Cas. 857, H.L.

(12) *Parkinson* v. *Wakefield & Co.* (1889) 5 T.L.R. 646, C.A.

(13) *Currie* v. *Misa* (1875) L.R. 10 Ex. 153 at p. 162.

(14) *Stilk* v. *Myrick* (1809) 170 E.R. 1168.

(15) *Vanbergen* v. *St. Edmund's Properties Ltd.* [1933] All E.R. 488.

(16) *Central London Property Trust Ltd.* v. *High Trees House Ltd.* [1947] 1 K.B. 130.

(17) *Combe* v. *Combe* [1951] 1 All E.R. 767 at p. 770.

(18) *Robertson* v. *Minister of Pensions* [1949] 1 K.B. 227.

(19) *Kepitigalla Rubber Estate Ltd.* v. *National Bank of India, Ltd.* [1909] 2 K.B. 1011 at p. 1028.

(20) *Murugesam Pillai* v. *Gnana Sambandha* A.I.R. 1917 P.C. 6 at p. 8.

(21) *Rameshwar Singh* v. *Bajit Lal Pathak & Ors.* A.I.R. 1929 P.C. 95 at p. 99.

CIVIL SUIT.

Patrick Tan for the plaintiffs.

T. O. Thomas for the defendant.

B.T.H. Lee J.: To appreciate the points canvassed before the court a few facts need be mentioned before I come to the pleadings which are somewhat elaborate.

Sometime about May, 1957, Ong Tiaw Kok, the first plaintiff and his brother, Ong Tiaw Sian, the second plaintiff in this suit applied to the defendant, Bian Chiang Bank Ltd., Kuching, (hereinafter called "the bank") for a loan in order to start a housing enterprise, comprising six shophouses and 97 terrace houses.

The plaintiffs executed a charge for the sum of $110,000 in favour of the defendant bank at a monthly interest of 9.6% *per annum*, giving by way of security certain lands belonging to plaintiffs.

Upon the charge, the plaintiffs were allowed to overdraw.

The plaintiffs continued the account in this way until August, 1967, when they executed another charge upon security of land for the sum of $440,000 at an interest set out in that charge.

The second plaintiff, Ong Tiaw Sian, was at all material times a sleeping partner and has given his brother, the first plaintiff full power and authority to manage their joint business.

It is also useful to note that the parties are related. The first plaintiff is the uncle of the director of the bank, Dato Wee Hood Teck (DW2) who is the nephew. The first plaintiff is also the brother-in-law of Harry Tnay (DW1) the manager and secretary of the bank having married the first plaintiff's niece. Finally Dato Wee and Harry Tnay (DW1) are brothers-in-law by marriage.

[The learned judge set out the pleadings and then continued:]

The substance of the plaintiff's evidence is that he bought over the estate of his father with the money his brother-in-law, Dato Wee Kheng Chiang (the father of Dato Wee Hood Teck — DW2) lent him from the bank. He charged two pieces of land *i.e.* Lot 175 and Lot 180 for the sum of $110,000 (Exhibit P3(1)) with interest at the rate of 9.6% *per annum.*

Whereupon he started an account with the bank called the Ong Tiaw Kok Account (referred to hereinafter as "Account No. 1") on 25th May, 1957.

Subsequently another account called the Ong Construction Company Account (referred to hereinafter as "Account No. 2") began on 31st October, 1963.

As will be seen later the facts are of some importance. I will set them out in some detail.

The plaintiff alleged that he had discussions with Dato Wee Hood Teck (DW2) (to whom I shall henceforth refer as "Dato Wee") who agreed to help and support him in financing his housing estate. His plan was to build 103 houses, *i.e.* 6 shophouses and 97 terrace houses. The amount needed was about 2-3 million dollars.

He drew from Account No. 1 to pay towards the cost of sub-division of the land, and to clear the site and for filling.

Until September 1966 when Account No. 1 was closed he was not informed of any change of the rate of interest. Nor has he agreed to any higher rate of interest.

Sometime in June 1966 he was asked by Harry Tnay to close his Account No. 1 and transfer the balance to Account No. 2. Accordingly, he drew a cheque for the sum of $167,033.60 on 30th September 1966 to clear the debt in respect of Account No. 1.

The amount of $167,033.60 was worked out by Harry Tnay.

The plaintiff stated that he was led to the impression that the sum of $167,033.60 included the sum of $110,000.

He had not received any statements of account from the bank as to the balance owing by him on 30th September, 1966. Nor did he receive the statements of account for periods from 1st July, 1957 to 30th June, 1960; 1st January 1961 to 31st May, 1963 and the month of February, 1964.

He was surprised to receive sometime before October, 1963, a demand for the sum of $105,000 from the bank in respect of the charge which he thought he had already settled.

Sometime in 1966 he executed another charge for $440,000 at the request of Harry Tnay on the instructions of Dato Wee. This charge was not registered because the lot numbers did not tally with the numbers given by the Land Office.

When Account No. 2 was opened, the first charge had not been discharged, the land titles in respect of the charged lands were still with the bank.

The two lots, *i.e.* Lot 175 and Lot 180, were subdivided into several lots, the titles of which were with the bank until they were partially released or the charge completely discharged.

He made drawings on Account No. 2 but he could not pay into the account until he had received the moneys from Borneo Housing Company which were proceeds derived from houses sold to purchasers who had obtained loans from Borneo Housing Company.

Up to 1968 when the writ of summons was issued he had completed a little more than 30 houses, and had arranged to sell the completed houses.

Although the houses were sold, he could not execute the necessary transfers because the title deeds were with the bank.

He consulted Dato Wee who agreed to release the titles on payment of $2,000 to $3,000 for each lot.

The payments were made for partial releases.

After the execution of the second charge he paid into the bank $8,000 for one lot partially discharged. Eight lots were thereupon released.

He said an arrangement was come to between himself, Harry Tnay and Dato Wee sometime in March, 1967. He was told he cannot draw any more money from the bank. For the discharge of each lot he had to pay $8,000.

Had he paid more than $8,000 in the bank, he was allowed to use the balance after deducting $8,000.

He applied for further releases, but they were refused by the bank. Dato Wee wanted payment of the whole loan of $554,260.95 made up of $105,000 and $449,260.95 whereupon he instructed his solicitors to write to the bank. The letter reads as follows:

"SY/223/67 4th December, 1967.

Messrs. Bian Chiang Bank Ltd.,
2 & 3, Main Bazaar,
Kuching.

Dear Sirs,

Re: Charge No. L.1113/57
Charge No. L.3229/67

by Ong Tiaw Kok & Ong Tiaw Sian

Further to our letter of 30th ultimo, we are informed by Mr. Ong Tiaw Kok that it was agreed between you and them that on tender of $8,000 for any lot you would release the lot from the charges. Considering the number of lots which have been mutated from the original parcel of land the Charges would be secured.

There are 69 lots of the land still remain under the Charges and there are 21 lots which had been sold and payments are

forthcoming if you will release them from the Charges. We give you below the particulars:—

Lot	Payment to be received	From Whom	Total
1228	$10,000.-	Purchaser	
1229	9,600.-	"	
1230	28,000.-	"	
1231	13,640.-	"	
1232	16,800.-	"	$ 78,040.-
1001	16,000.-	"	
1011	6,000.-	"	
1012	12,665.-	"	
1018	5,000.-	"	$ 39,665.-
1013	15,000.-	BDCL	
1014	15,000.-	"	
1016	16,800.-	"	
1017	15,000.-	"	
1020	23,500.-	"	
1035	15,000.-	"	
1241	15,000.-	"	
1240	17,000.-	"	
1242	23,500.-	"	
1245	12,000.-	"	
1246	10,000.-	"	
1247	12,000.-	"	$189,800.-
			$307,505.-

Enquiries have been received for purchase of the other remaining lots and no doubt the Chargors will be able to pay the amount of debt which may be found to be owing to you.

We understand that the development project was launched with assurance of your support and so far it has worked to the benefit of both parties. Our clients would not have embarked on the development scheme if you had not given them the assurance and support. Our clients are grateful to you for the support but would appeal to you to adhere to your agreement of partial releases of individual lots.

If necessary, we will undertake to collect all the payments stated above as they come in, providing that you will execute the partial discharge in respect of any of them for which (by notice to you) payment will be made, and pay over the same to you.

We hope that this proposal is acceptable to you.

Yours faithfully,
Sgd: Yong & Co."

The bank replied refusing to release the lands requested.

Thereafter the bank instituted proceedings by way of originating summons.

On 26 September 1967 the plaintiff received a letter of demand from the bank.

It was not until then that he checked his bank statements with the help of an accountant and he found the interest had been over-charged.

Messrs. Aslam Wong Salleh & Co. have worked out the interest for nearly ten years. The interest varied from 9.6% to 17%.

Towards the end of 1967 the interest calculated by the bank and payable each month come to about $5,000.

Efforts were made to settle the account, and he sought the assistance of other banks.

He disputed the rate of interest as charged and requested his solicitors to write to the bank accordingly. (See Exhibits E.10 and E.11).

The case came on for hearing on 24th June, 1968. He was however willing to settle the amount which he did so without prejudice.

The figure worked out and given by the bank was $592,358.23. Accordingly, a cheque for that amount was paid to the counsel for the bank The discharge having been executed he received back all his titles relating to Ong Construction.

He agreed in cross-examination that he received regular statements of account for Ong Construction Account No. 2 from 1963 October to 1967 December (except for February, 1967).

He discovered that interest was over-charged when he received the summons. He did not take up the matter of interest at the hearing of originating summons, because he assumed the interest was correct at 9.6%.

Although he had a look at the bank statement received he did not know the rate of interest charged. He agreed that the account was always overdrawn except for one day.

This was owing to the fact that he lacked funds and depended on the assistance of Dato Wee.

He had received statements of accounts for Account No. 1 for 47 months, but had not received the statements of accounts for 66 months in respect of the same account. He admitted he saw the figures "interest" inscribed in Chinese in the accounts but believed the interest is as stated in the memorandum of charge.

He was asked by Dato Wee to pay $167,033.60 to close No. 1 Account in September, 1966, but he did not know what the sum represented.

He believed Harry Tnay, when the latter showed him the statement showing the balance.

He denied he knew all along that the interest on clean advances *i.e.* overdrafts was 1.2% per month without security, nor did Harry Tnay inform him about it.

He had mentioned that he required 2-3 millions for his project but he did not require that much to start with. The amount was not given in a lump sum. The sums given depended on the progress of the work done.

It was true that when Account No. 1 was closed he did not protest about the interest.

He also agreed that the Account No. 2 was overdrawn in the sum of $468,189.96 on 31st December 1967.

At the close of September, 1966, he owed the bank on the charge $110,000 and $536,479.52 on Account No. 2.

No further drawings were made on the account because Dato Wee stopped him from drawing any more money.

He denied that Dato Wee said it was a large unsecured debt. He said he must obtain Dato Wee's permission. It was at this stage that he charged his land for $440,000.

This was done in order to enhance the value of land because he had dumped money into the land. I will quote what was said in cross-examination.

Q. Not to provide enhancement but to provide security for the overdraft.

A. It was his proposal.

Q. Bank not concerned with enhancement but to secure the unsecured debt.

A. Land is worth that much.

According to him land values were rising from $17,000 in 1957 to $100,000 per acre in 1966, and the abortive charge was executed in September, 1966 for $440,000.

In 1965 the first building was completed. $20,000 received from Borneo Housing was credited to Account No. 2 when 8 lots were sold on hire-purchase.

Whenever releases were made the sums were credited into the account in order to keep down the overdraft. This practice continued in 1965 and 1966.

He disagreed with the three conditions stipulated by Dato Wee. They were to pay the bank $50,000 before 19th November, 1966; to pay $77,300 due from Borneo Housing Development; and to sell certain lands in plaintiff's own name and to pay in the proceeds.

As far as he knew Dato Wee was the managing director in 1960 and 1961.

On 30th December, 1966 he paid $30,000 in two sums.

He also said that he received $77,300 from Borneo Housing and he paid the sum into the bank, but not in a lump sum.

The sum of $307,505 mentioned in his letter dated 5th December, 1967, was not paid into the bank.

In re-examination he said $307,505 was not paid into the bank because the bank refused to release the partial discharge.

The bank was not agreeable to the proposal mentioned in the letter.

He had paid the sum of $77,300.00 as shown in Exhibit E.2.

They were $10,000 paid on 17th August, 1966; $18,000 each paid on 14th September, 1966, and 29th October, 1966; $9,000 on 8th November, 1966; $15,000 on 19th November, 1966; $23,000 on 9th December, 1966; $1,000 on 11th December, 1966 and $20,000 and $10,000 on 30th December, 1966.

On 30th September, 1966, according to the statement he owed the bank $167,033.60.

He disputed that on 14th September, 1966, he was owing $364,875.38 nor was he owing the amount of $531,908.98 on 30th September, 1966.

He paid into the bank the purchase money he received from the sale of houses.

As the full accounts have not been received from the bank at the time originating summons was heard, hearing was stayed at his request.

He trusted the bank and he did not ask anyone to check the accounts before the two letters of demand were received from the defendant.

Salleh bin Yusof, a chartered and certified accountant (PW2) said he checked some of the figures in respect of Ong Tiaw Kok (Account No. 1) and Ong Construction Company (Account No. 2).

On the basis of the statements supplied he reconstructed such statements ignoring all interest elements and substituting thereon interest calculated at the rate of 9.6% on daily balance and on monthly rests.

He noticed that in respect of Account No. 1 the interest charged is in excess of 9.6%.

For the month of May, 1957 the rate was 9.7% *per annum.*

For January 1958 the interest was 9.1%; March, 1958, it was 9.8%; September 1958 it was 9.9%; December 1958 it was 10%; March 1960 it was 10.3%; March 1962 it was 10.9%; January 1963 it was 11.5%.

He worked out the figures on the basis of actual daily balances as shown in the bank statement supplied to him.

The workings were on monthly rests *i.e.* the interest at the end of the month is compounded. In other words, the interest added at the end of the month forms part of the balance upon which further interest will be charged.

If the interest is calculated on basis of simple interest it will be less.

He added that there was nothing wrong if the arrangement between bank and customer is by compound.

On the assumption that $110,000 was a fixed loan, interest charged by the bank was 1.56% *per mensem* in April 1959.

In April 1962 interest was at the rate of 1.2% *per mensem.*

In April 1963 it was 1.2% *per mensem.*

In April 1965 it was 1.26% *per mensem.*

In November 1965 the rate of interest was 1.25% *per mensem.*

And in December 1965 interest was at the rate of 1.3% *per mensem.*

The assumption was that interest of fixed loan of $110,000 at 9.6% *per annum* is $880 *per mensem* and that balance of interest charged by the bank monthly *i.e.* after deducting the $880 *per mensem* represents the interest in the current overdraft balances.

In respect of Account No. 2 he checked only one calculation on this for the month of November 1966 on the same assumption as in No. 1 Account.

He found that the interest charged by the bank was more than the rate of 1.2% per month.

He also found that the interest of $880 *per mensem* was debited against Account No. 1.

Before September, 1966, when $167,033.60 was paid into Account No. 1 the interest on $110,000 at 9.6% *per annum* was debited into this account although the principal was not shown in Account No. 1.

The rate charged by the bank in respect of Account No. 2 was 14.6% *per annum*. This was calculated on the actual interest charged by the bank in relation to the outstanding balances in that account month by month.

In the majority of months it was 14.6%.

For the month of June, 1966, it was 15.1% *per annum*.

After the month of September, 1966, to month of August, 1967, the rate was 16% and above.

He assumed that the interest on fixed loan of $110,000 was debited to Account No. 2 as at October, 1966.

After September, 1966, assuming interest on $110,000 was not charged to Account No. 2 the rate of interest was calculated at 12% *per annum* for September, October and November, 1967, and 13% *per annum* for December, 1967.

Assuming that interest on $110,000 was charged to Account No. 2 the interest rate was 9.9% in September; 9.6% in October; 9.9% in November and 10.5% in December, 1967.

In April 1967 the rate of interest was 17% *per annum* and 13.9% on the other assumption.

The rates calculated are in excess of 9.6%.

The overdraft outstanding including interest up to 30th September 1966, was repaid on 30th September 1966 in the sum of $167,033.60.

The interest rate for November 1967 on assumption that the fixed loan of $110,000 is charged at 9.6% is equivalent to $880 *per mensem*.

The rate of interest on the current overdraft is at 0.8142% *per mensem* which is approximately 9.8% *per annum*.

In cross-examination he said 9.9% interest for September 1967 was on assumption that interest charged includes interest for fixed loan of $110,000.

12% was interest charged for overdraft assuming that interest does not include the $110,000.

Q. Take $880 from interest September, October, November and December each 1967, the interest is on average 9.6%.

A. No. The interest for month of September, 1967, was $4,612.29.

The interest on $440,000 and $97,000 at 9.6% = $4,237.15 on a 30 day month.

The interest on $13,873 (unsecured) at 1.2% = $116.48.

Basing on his calculations the interest is 1.3% for September 1967 and not 1.2%.

Interest varies according to arrangement between parties. Interest on an unsecured loan is normally different from a secured loan. That is the usual banking practice in Malaya.

In re-examination he said the interest on $537,000 on a 30-day month basis at the rate of 9.6% *per annum* is $4,237.15 for month of September.

$537,000 = $440,000 + $97,000 (Balance of $110,000).

The interest on $537,000 at 9.6% for 30 days is $4,237.15.

The figure for 31 days is $4,378.39.

After paying the interest $4,237.15 the interest on the balance is $375.54. The balance is $28,260.

The interest charged for the month of September 1967 is 1.3%.

The rate charged for October is 1.4%; November 2% *per mensem* and December 3.2% *per mensem*.

These are all on overdrafts on per month basis.

The manager of Borneo Housing, Wong Syn Leong (PW3) said that Ong Tiaw Kok Construction is an approved estate under the Loan Housing Scheme.

Loans were released or paid out by instalment according to the progress of construction work.

On receipt of registered mortgage documents, releases were made according to the stage of construction of the building.

Before 5th December, 1967, seven cases were approved. The amount involved was $125,300.00.

Soon after December, 1967, five further cases were approved. The amount involved was $65,000.00.

The loans would be released as soon as the charges are transferred and registered.

The loans finally given were in respect of the 12 cases

Evidence was given by Harry Tnay (DW1), Secretary to the bank. He said he is now director and secretary of the bank.

He said the plaintiff signed a charge for $110,000 in 1957 at the rate of 9.6% *per annum* (Exhibit 3(1)). It is 0.08% per month.

The plaintiff opened an account in his own name in the sum of $500. The bank issued a cheque for $110,000 to the plaintiff. He paid the sum into the bank and on the same day drew a cheque for $110,000 on the same account.

The arrangement was one by which interest due every month should be debited to his personal account. The account was thus kept on as arranged in the course of business with withdrawals and payings in. This account became an overdraft.

The interest charged on personal account was 1.2%. He alleged this was made clear to the plaintiff. The account being unsecured carries a higher rate of interest.

The bank draws a distinction between clean loans and secured loans. In the case of clean loans no security is furnished.

9.6% was charged as a result of plaintiff's request.

This account was closed subsequently by drawing a cheque on Account No. 2.

Account No. 2 was opened in 1963 and soon this account grew into a large overdraft.

The interest charged on the overdraft is 1.2% per month.

The plaintiff was aware of this rate of interest. The communication was verbal.

The account shows a debit balance of $321,281.71 in December 1965 (see Exhibit P2).

On 31st December, 1966 there was a debit balance of $482,462.83.

On 30th September, 1966, a cheque was drawn in the sum of $167,033.60, to clear up the Account No. 1.

The position on 30th September, 1966, was such that there was a debit balance of $536,479.52. This was in addition to the second loan of $110,000.

Piece-meal releases were made by the bank when some buildings were completed and payments were made into this account.

The arrangement was that the sums realised from the releases be paid into Account No. 2 to keep down the unsecured debt.

There was no agreement, but this was merely an accommodation to assist the plaintiff.

At that time there was still a charge hanging over the whole advance *i.e.* unsecured sum.

The bank wanted a charge to cover clean advances. For some reason the charge was delayed and not registered in the Land Office (see Exhibit P4).

There was no agreement for partial releases upon payment of $8,000.

A meeting took place in early September, 1966 (not in March, 1966) in order to regularise the account. Bank Negara was unhappy. It was agreed that a second charge for $440,000 be executed. In addition there were three conditions to keep down the account, which were recorded (See Exhibit D12).

The plaintiff did not keep the conditions. The sum of $77,000 was not received on the target date *i.e.* November, 1966, although the bank received the sum in instalments subsequently.

According to law, banks cannot charge more than 15% *per annum.*

Although the note mentioned $550,000 the bank was never prepared to accept $440,000 on the second charge.

He agreed that the land could be worth $440,000.

Account No. 1 was closed on September 30, 1966.

Since the meeting various payments were made into the account but they did not amount to $50,000.

Lot 1002 was released on 14th October 1966. Lots 1008 and 1005 were also released on 14th October 1966. These were the only 3 lots released before November, 1966.

Eight partial releases were made on 5th May, 1967, 21st September, 1967 and 24th October, 1967.

Total sum of $64,000 was paid on 29th August, 1967, for the release of eight lots.

In August, 1967, the second charge was registered (Exhibit 3(2)), for $440,000 at 9.6% with monthly rests.

At this time Account No. 2 owed $468,260.95.

The second charge was executed for $440,000 because the bank expected the 3 conditions to be fulfilled.

On 31st August, 1967, the interest charged was 1.2% per month.

The interest was calculated to include interests on secured loan of $110,000 at 9.6% *per annum* and $468,260.95 at 1.2% per month.

This gives the combined figure of $6,677.28.

The rate of interest is 9.6% *per annum* of $110,000 minus $13,000 = $97,000.

The same interest is charged for $440,000.

Anything owing above the $440,000 and $97,000 would be treated as unsecured and charged at 1.2%.

$110,000 was a different fixed loan account.

Interest on $110,000 was never paid physically and it was debited to Account No. 1 and carried interest at 1.2% per month.

I now turn to the evidence of Dato Wee Hood Teck (DW2).

His evidence was to the effect that he was managing director of Bian Chiang Bank in July, 1962.

He was not in a position to give any assurance to the plaintiff that he would finance his housing estate since he was not the managing director in 1961.

The sum of $110,000 at the rate of 9.6% was arranged through Dato Ong Kee Hui who was the manager then and approved by his father Dato Wee Kheng Chiang.

There was some discussion in September 1966 between himself, the plaintiff and Harry Tnay about the release of lots subject to three conditions. The conditions were not fulfilled.

At that time the whole overdraft amounted to over $660,000 and the secured amount was only $110,000. He had released certain lots in order to accommodate the plaintiff.

Originally the releases were made upon payment of $2,000 and $3,000 but when the overdrafts grew larger the bank asked for $8,000.

That is the sum of evidence adduced by both parties.

It is to be observed that there are four prayers to the statement of claim. At the hearing the first two prayers were abandoned by counsel for the plaintiffs as it was suggested by counsel for defendant and

indeed conceded by counsel for plaintiffs that the effort would be more than an academic exercise. (See *Majumder* v. *Attorney-General of Sarawak*[1] at page 134 and *S. A. de Smith's* Judicial Review of Administrative Action (1959) Edition page 394).

In the state of pleadings the remaining points that arise for consideration of the court fall into four distinct questions namely:

(a) Whether the plaintiff agreed to pay interest on the loans at the rate more than 9.6% *per annum* and to pay compound interest?

(b) Whether there was an unsecured account? If so, whether the plaintiff has agreed to pay interest at 1.2% per month or more on such unsecured account?

(c) Whether there was any previous agreement for partial releases upon payment of $2,000 or $3,000?

(d) Whether there was any agreement reached between the parties for the partial releases of titles from the first charge (Exhibit 3(1)) upon payment of $8,000 for each lot.

I will deal with the first and second of these questions and confine myself to stating as briefly as I can the matters which appear to me to be relevant to the points argued before the court.

It was contended by the plaintiffs that they borrowed the sum of $110,000 to buy up the other shares of the estate. As security for the loan the plaintiffs charged to the bank the lands comprised in the estate *i.e.* Lots 175 and 180.

The first clause of the first charge (Exhibit 3(1)) is expressed as follows: —

"...do hereby jointly and severally promise the (sic) repay the same on demand and until payment to pay interest thereon monthly at the rate of 9.6 *per centum per annum.*"

The second clause reads as follows: —

"As security for the above sum and interest we hereby charge to the chargee all our right title share and interest in all those two parcels of land described in the Schedule hereto."

Then follows the Schedule.

It was submitted on behalf of the plaintiffs that the defendant is only entitled to charge simple interest on the loan of $110,000 for the period the sum or the balance thereof remained owing.

It appears that interest was charged on the arrears of interest to Account No. 1 and Account No. 2 up to August, 1967, when the second charge (Exhibit 3(2)) was executed.

It was also contended that there was no provision for the payment of compound interest in the first charge as no mention of "rests" was made in that charge.

In support of his contention, counsel for the plaintiffs cited two cases *Moore and Others, Assignees of Sheath and Others* v. *Voughton*[2] and *Dawes* v. *Pinner*,[3] also reported at page 297 of English and Empire Digest Vol. III paragraphs 920 and 922 respectively.

In *Moore and Others, Assignees of Sheath and Others* v. *Voughton* action was brought to recover the interest upon monies advanced to the defendant by the bank. It was there held that it was not sufficient to show that it was the general custom of the house to charge interest calculated upon half-yearly rests, without also showing that defendant knew that such was the practice such knowledge of the customer must be proved by the bank. The bank were therefore only given a verdict for the principal sums advanced with interest calculated upon each sum from the time of the advance but without rests.

In *Dawes* v. *Pinner*, the bankers sued to recover an overdraft. In making up the account the bankers had struck a balance at stated times and charged interest upon sums found to be due. It was held that the bankers could only recover simple interest.

It is convenient to observe that Forms are prescribed under section 146 of the Land Code for the alteration of terms of the charge. They are Form I — which is a memorandum of increase or reduction of amount owing under charge, and Form J — which is a memorandum of increase or reduction in rate of interest.

There is nothing in the evidence to show that there was a subsequent agreement to vary the interest to one at the rate of 1.2% per month as alleged by the defendant.

Even assuming that there was an oral agreement, it cannot affect the terms of the first charge, by virtue of the provisions of sections 93 and 94 of the Sarawak Evidence Ordinance (Cap. 54), which exclude all oral evidence contradicting, varying adding to or subtracting from the terms of the charge.

Any variation of the terms of the first charge must be made in the manner prescribed in the Land Code.

It is to be observed that such a Form is also prescribed under section 146 of the Land Code for the alteration of the terms of the charge.

I refer to Form J which is a memorandum of increase or reduction in rate of interest.

Section 143 of the Sarawak Land Code (Cap. 81) sets out the provisions in regard to forms of charges which are prescribed in the First Schedule.

It may be here observed that all three charges were executed substantially in the Form H(1) as prescribed. They are:

(a) First charge executed on 24th May, 1957 in respect of the sum of $110,000 (Exhibit 3(1)).

(b) Second charge executed on 29th September, 1966, in respect of the sum of $440,000 (Exhibit 4).

(c) Third charge executed on 25th August, 1967, in respect of the sum of $440,000 (Exhibit 3(2)).

At this stage it is desirable to point out that the second charge executed on 29th September, 1966 (Exhibit 4) was for the same sum of $440,000 and follows the same provisions as the third charge (Exhibit 3(2)), except that the number of parcels of land in this case is 88 and not 77 as in the third charge.

This second charge was rejected by the Land Office when it was presented for registration by reason of the errors in the lot numbers of some of the parcels of land mentioned therein.

It is convenient to set out the material parts of the first and third charges, which are as follows:

The first charge is as follows:

"We, Ong Tiaw Kok (NRIC.S. 014525) and Ong Tiaw Sian (NRIC.S. 444644) (both Hokkien) of 2nd Mile, Rock Road, Kuching, Sarawak, being the registered co-proprietors holding one half undivided share each of the property hereinafter described IN CONSIDERATION OF the Bian Chiang Bank Limited, ... having advanced to us the sum of Dollars one hundred and ten thousand only ($110,000) the receipt of which sum we hereby acknowledge do hereby jointly and severally promise the (sic) repay the same on demand and until payment to pay interest thereon monthly at the rate of 9.6 *per centum per annum.*

As security for the above sum and interest we hereby charge to the chargee all our right title share and interest in all those two parcels of land described in the Schedule hereto."

Then follows the Schedule. The third charge is as follows:

"We, ONG TIAW KOK alias ONG SAY KOW (NRIC.S. 014525) replaced by S.I.C. 598899) and ONG TIAW SIAN (NRIC.S. 444644) both of 2½ Mile, Rock Road, Kuching, Sarawak, (hereinafter called the chargors) being the registered co-proprietors holding one-half undivided share each of the land hereinafter described in consideration of the BIAN CHIANG BANK LIMITED, ...granting or continuing to grant accommodation to ONG CONSTRUCTION COMPANY, of 2½ Mile, Rock Road, Kuching, Sarawak, ... by way of a fluctuating overdraft or otherwise to the extent of Dollars Four hundred and forty thousand only ($440,000.00) DO HEREBY JOINTLY AND SEVERALLY promise to repay the same on demand or to repay the balance which at the date of such demand shall be owing to the chargee.... including interest at the rate of Nine point six *per centum* (9.6%) *per annum* calculated on daily balances with monthly rests, commission and other customary banking charges and the costs of the preparation execution, stamping and registration of this charge, and also to pay interest at the rate of Nine point six *per centum* (9.6%) *per annum* on such balance from the date of such demand until payment.

As security for the above sum and interest or for any moneys that may become payable hereunder we hereby charge to the chargee the following parcels of land, viz:—

All our undivided right title share and interest in all those 77 parcels of land together with all the buildings and appurtenances thereon situate at 2½ Mile, Rock Road, Kuching, Sarawak, containing an area of...."

Then follows the descriptions of those 77 parcels of land. (Underlining is mine).

For our purpose it will be relevant to refer to two charges only, namely (a) and (c) above, which for convenience will be called "the first charge" and "second charge" respectively.

The defendant contended (by paragraph 11 of the defence) that he was entitled to charge and had charged 1.2% per month interest on clean advances (*i.e.* unsecured advances).

It was the plaintiff's contention that there has been no clean or unsecured advances or overdraft. The original loan of $110,000 was secured by the first charge (Exhibit 3(1)).

The interest on this amount not having been paid by the plaintiff was charged to Account No. 1 and subsequently merged with Account No. 2 sometime in September, 1966.

To charge interest in this manner would mean charging at compound interest which was not provided for.

Notwithstanding they were not secured by the first charge (Exhibit 3(1)), these drawings together with the interest charged by the bank (assuming they were entitled to do so) were secured by the two parcels of land (Lots 175 and 180) which have been sub-divided and built on. Consequently the land values had appreciated to a considerable extent, all drawings from the bank having been expended in making preparations on the said lands for building on the said lands.

Action was accordingly taken to create another charge in the sum of $440,000 at an interest of 9.6% *per annum* with monthly rests over the same parcel of lands which by then had been subdivided into 88 lots.

This charge was rejected by the Land Office for the reasons stated in the evidence of the plaintiff.

Subsequently in August, 1967, a second charge was executed (Exhibit 3(2)), the lands being subdivided into 77 parcels.

All the titles were held by the bank as security at all material times until the accounts were paid off on 25th June, 1968, without prejudice to the case (except those titles which were released from the first charge for an agreed sum).

It necessarily follows that at no stage were the plaintiffs' accounts unsecured.

It is further contended that even before 1966 or 1967 the securities were already in the hands of the bank, pledged to the bank as security for all advances.

Counsel for the plaintiffs referred to a case *Re Williams*,[4] where it was decided that the deposit of all the titles with the bank was to cover all overdraft and such overdue monies outstanding from the plaintiff's account.

A pledge by the plaintiffs of their titles to secure their overdraft creates an equitable charge over those properties under section 119(4) of the Sarawak Land Code.

It is said by counsel for the plaintiffs that at the least the value of the land was about $550,000 in or about September, 1966. It is to be observed that Harry Tnay's evidence stated that "he agreed the land could be worth $440,000."

The plaintiffs' overdraft was secured at least to the value of $550,000 in September, 1968, notwithstanding there was no legal charge for that extent.

In September 1966 the two accounts merged. Now, assuming the bank was entitled to charge interest as it did it only amounted to $531,908.98. Taking into account the fixed loan of $110,000 the total is $641,908.98. This is the amount as at 30th September 1966 when the second charge (Exhibit 4) was created.

In the state of things it seems the clean overdraft or advances will only amount to $91,908.98 ($641,908.98 less $550,000, the value of the lands then).

The defendant had on the other hand treated the sum of $531,908.98 as clean overdraft and charged a high rate of interest at 1.2% *per mensem* and in some cases in excess of that rate.

It is contended that the normal practice of banks is to have a signed undertaking or "letter" by the borrower when clean advances are given and a rate of interest agreed upon.

No such document has been produced by the defendant showing that the first plaintiff has agreed to pay 1.2% and more per month interest on any clean advances given by the bank.

Again, assuming they were clean advances as alleged, the question arises — did the plaintiff agree to pay interest at the rate fluctuating between 1.2% per month and 3.2% per month?

Reference was made to three authorities, on the question of failure to raise any objections when the statement of accounts were furnished to the plaintiff.

In the case of *Eaton* v. *Bell*,[5] the bankers charged the defendants interest with half-yearly rests in accordance with their general practice. The defendants were in the habit of taking their banking books to the bankers to have the account made up and no objection was made by the defendants to the charges for compound interests. It was held that the defendants, having assented to the mode of keeping accounts, it was not unlawful.

In the case of *Williamson* v. *Williamson*,[6] it was held that the charge of commission has been acquiesced in and was valid for the half year ending in that year, but acquiescence could not be inferred for subsequent half-years.

In *Spencer* v. *Wakefield*,[7] the plaintiff in 1874 obtained an advance from the defendants, bankers, upon security. The defendants issued a pass-book to the plaintiff, in which they made half-yearly rests and entered charges for "interest and commission" The plaintiff from time to time paid in sums to the credit of the account, but never drew on it. The pass-book was from time to time received by the plaintiff and on two occasions he wrote to the defendants acknowledging the accounts to be correct. In December, 1884, the plaintiff paid the balance appearing in the pass-book to be due to the defendants and closed the account. Two years later the plaintiff sued the defendants to recover the sum of £95, being the aggregate amount of the commissions charged, on the ground that commission was not chargeable on a single advance with gradual repayments. It was held that the plaintiff had assented to the accounts and had no cause of action.

The question for determination here is whether there is evidence to show that the plaintiffs had assented or acquiesced to the charging of compound interest.

The defence has contended that the capital and interest as claimed by the defendant had been paid by the plaintiffs on 26 June, 1968, and the accounts between the parties settled. That being so it is not open to the plaintiffs to open the settled accounts and they are estopped from doing so now.

It was contended that the plaintiffs were charged interest with periodical rests or compound interest at the rates shown in the statements which was with the express consent of the plaintiffs.

Further the plaintiffs have acquiesced in the accounts being kept on that basis, and had received the respective accounts regularly for many years.

No complaint in respect of non-receipt of account except for the periods mentioned was made.

The statements of account showed clearly the interests charged. If the plaintiffs had any doubts about the statements they should have obtained clarification from the bank.

Counsel for the defendant then referred to *Chitty* on Contracts (Specific Contracts) 22nd Edition paragraphs 943 and 944 on the question of interest.

"943. *Interest payable by agreement, course of dealing or usage.* Interest may be claimed in all cases where there is a contract for the payment of it. Such a contract may be inferred from the course of dealing between the parties; e.g., if it has been frequently charged and paid without objection in former and similar accounts. So, if it appears to be the invariable custom or usage in any particular trade or business to charge interest, this may amount to evidence of a contract to allow it between parties having transactions therein. Thus interest has been held to be payable on an account stated for money lent, as between merchants. Where a contract to repay money on a certain date provides for repayment with a certain rate of interest up to that day, there is no implied contract that interest at the same rate is to be payable afterwards. But where there is a contract to pay a sum of money with interest on a certain day the jury may give interest by way of damages for the detention of the debt beyond that day."

"944. *Compound interest.* Compound interest is not payable upon money lent, unless there is a contract for its payment expressed, or implied from the mode of dealing with former accounts, or from custom. By the practice of bankers, interest upon the customer's indebtedness is periodically added to the capital sum advanced, so that, in effect, compound interest is secured, and this practice is binding upon those who acquiesce in it. A customer is not bound or affected by the practice of his bankers to charge interest upon interest by making rests in their accounts at stated intervals, unless it is proved that he was aware that this was their custom. An executor or trustee may be charged with compound interest upon trust money in his hands, if he has or ought to have received such interest."

Counsel for plaintiff submitted that in the instant case there has not been any acknowledgment of the correctness of the account and the accounts were "settled" in June 1968 upon a "without prejudice" basis in order to save further interest.

The first plaintiff had no idea how the interest was calculated, whether it was compound or simple interest, nor the rate, interest was charged.

Reference was made to *Fergusson* v. *Fyffe*[8] and *Overseas Chinese Banking Corporation* v. *Tan Cheng Hoe*.[9] The cases cited held that unless the customer is proved to have agreed or acquiesced in the charging of compound interest, knowing the custom or practice of the bank, no compound interest can be charged.

See also *Chorley* on Law of Banking (5th Edition) page 145:

"Mistakes to Customer's Detriment

In the English cases so far as they go it does not appear that there is any estoppel against a customer who by returning his passbook to his banker, whether initialled or not, represents that the items are correctly stated. Even if this amounts to a representation, which is questionable, it is difficult to see how the banker can act upon it so as to alter his legal position."

"No Duty to Examine

An endeavour has been made to put the matter on another footing by the contention that the customer who does not examine his pass-book and discover the errors is guilty of

negligence, and that this negligence disentitles him from claiming to have the account stated set aside, or surcharged and falsified. But before there can be negligence in law there must be a duty to take care. There appears to be no duty on a customer to read his pass book, so that there can hardly be a duty to exercise care in doing so when he does read it."

See also *Halsbury's* Laws of England Volume 2 (3rd Edition) page 229:

"*Interest.* By the universal custom of bankers, a banker has the right to charge simple interest at a reasonable rate on all overdrafts. An unusual rate of interest, interest with periodical rests, or compound interest can only be justified, in the absence of express agreement, where the customer is shown or must be taken to have acquiesced in the account being kept on that basis. Whether such acquiescence can be assumed from the return without comment of the pass-book showing interest so charged is doubtful."

I have considered the cases cited by both counsel and it seems to me that the cases of *Fergusson* v. *Fyffe* and *Spencer* v. *Wakefield* are important, for they recognize the system of bankers in turning interest into capital as usual and binding on the parties who have acquiesced in it. It seems to be a question in each case whether the customer did acquiesce in it.

Applying the principles stated in the cases to the circumstances of the present case it must therefore be concluded that the defendant bank is not entitled to charge compound interest and in the form of interest at 1.2% *per mensem* and more unless the plaintiffs acquiesce in it.

In my opinion acquiescence arises only where the plaintiff acquiesced in the interest to be charged with full knowledge of the facts *i.e.* secured and unsecured loans.

On these matters therefore where there is a conflict of evidence between the first plaintiff and Harry Tnay, I accept the first plaintiff's version in preference to that of Harry Tnay.

Taking all the circumstances of the case into consideration as well as the arguments of counsel, I see no reason to doubt that this is clearly a case where the plaintiff honestly entertained that belief that the interest charged by the bank was 9.6% and that the transaction between the plaintiffs and the defendant bank operated on that understanding, and I hold and find as a fact that the plaintiffs never did acquiesce in the compound interest. I think that there was never an agreement to pay 1.2% and more per month interest on any clean advances.

I also find as a fact that the plaintiffs drew the cheque for $167,033.60 of Account No. 2 and pay to Account No. 1 at the request of the defendant without knowing the real reason therefor.

I turn to the third and fourth of these questions and will deal with them together, *viz*: —

"(c) Whether there was any previous agreement for partial releases upon payment of $2,000 or $3,000.

(d) Whether there was any agreement reached between the parties for the partial releases of titles from the first charge (Exhibit 3(1)) upon payment of $8,000 for each lot."

The evidence of the manager of Borneo Housing seems to be relevant here.

According to the evidence of the manager of Borneo Housing (PW3), Ong Construction is an approved estate under Loan Housing Scheme.

When mortgage documents have been registered and received by the company loans are released by instalments according to the progress of construction work.

In so far as this construction is concerned, loans were approved before December, 1967, in seven cases, amounting to $125,300.

Shortly after December, 1967, five further cases were approved amounting to $65,000.

Apparently this procedure was followed until it was stopped in March, 1967.

It was contended that the indorsement on the first charge clearly shows that releases were made on such payments, namely $2,000 or $3,000.

It was the plaintiff's evidence that there was originally this arrangement which would facilitate transfers of the completed lots to various purchasers who have to obtain loans from Borneo Housing.

As explained by the manager of Borneo Housing, the charge would be done simultaneously with the transfer and registered.

Moneys for the charge would then be released by Borneo Housing after the registration of discharge transfer and charge in respect of any particular lot.

The moneys so released would then be paid into the plaintiffs' account with the defendant.

This procedure was followed for the many lots listed in the first charge until it was stopped in March, 1967.

It was also contended that there was an agreement reached whereby the plaintiffs pay $8,000 for the release of further eight lots, namely Lots 1032, 1036, 1266, 1003, 1031, 1033, 1034 and 1233. The payments for these releases appeared in the statements of account of Ong Construction.

They are:

$16,000 on 27th April, 1967;
$16,000 on 29th August, 1967;
$16,000 on 11th September, 1967;
$19,000, $5,000 being credited towards reducing the fixed loan of $110,000;
and a further $8,000 on 29th September 1967 (which was also credited towards the fixed loan account).

It was contended that the consideration being that the plaintiffs agree not to draw any further sums out of the accounts but to pay $8,000 for each lot the plaintiffs wanted released. This consideration was given in September 1966 as the date the defendant says the meeting was alleged to have been held.

This agreement was part performed by the plaintiff as shown above *i.e.* the partial release of the above 8 lots upon payment of the total sum of $64,000 and the plaintiff was willing and able to continue to fulfil such agreement. If there was no such agreement for releases, the plaintiffs would not have been required to pay the $64,000 and the defendant would not have given the releases.

These releases were not mere acts of grace as the defendant alleged, but made in order to induce the plaintiffs to execute the second charge.

It was argued that these are acts of part performance consistent with the agreement.

The letter of 5th December, 1967, shows that the first plaintiff was still ready and willing to carry out his part of the bargain, but the bank did not keep up with its bargain to allow further releases and took out originating summons for the sale of the charged lands.

The agreement was reached sometime in March 1967 (defendant says it was in September 1966). It was contended that in fact there was an agreement on these terms and the plaintiff has part performed the agreement thus invoking the doctrine of part performance as the first plaintiff has fulfilled the three requisites as required in *Chitty* on Contract at page 141 (21st Edition), namely:

"(1) The part performance must be by the party (plaintiff) seeking to enforce the contract;

(2) The acts of part performance relied on must be unequivocally and in their own nature referable to some such agreement as that alleged to exist;

(3) The acts of part performance must be consistent with the agreement and with nothing else;"

Attention has also been drawn to the case of *Mahomed Salleh* v. *Nacodah Merican*: (10)

"That was a case where the defendant on the marriage of his daughter to the plaintiff promised in writing, *inter alia* to 'build and give' to the plaintiff 'a suitable house'. The defendant afterwards built a house and the court was satisfied on the evidence he did it for the plaintiff and had let plaintiff into possession of it in pursuance of the promise. After residing there some years, the plaintiff fell out with the defendant and quitted the house and some time after brought a suit for specific performance by the defendant of his promise by 'building and giving' him 'a suitable house'.

It was there held that though the promise was void under the Statute of Frauds for uncertainty as to the house intended, and the court could not say what was 'a suitable house' yet the parties had by their acts pointed out the house intended and the letting plaintiff into possession thereof, was a part performance which took the case out of the statute...."

The three conditions which were mentioned by the defence may have been stipulated. They are, however, conditions subsequent to the performance of the agreement.

It is within the knowledge of defendant that unless partial releases were given the plaintiffs cannot sell the lands and cannot obtain the money to pay into the account with the defendant.

Indeed, some of the parcels mentioned in Exhibit D13 were released and the moneys paid into Account No. 2 in November and December, 1966.

For ease of reference I set out below the contents of Exhibit D13.*

It was pointed out that if the defendant had observed the terms of the agreement the plaintiffs would have saved on interest.

The moneys mentioned in the letter of 5th December, 1967, would have been paid earlier as the loans amounting to $125,300 have been approved by Borneo Housing before 5th December, 1967, and there were other purchasers buying the property for cash.

Refusing to comply with the agreement and allowing of partial releases the lots could not be sold, and money which could be obtained towards reducing the debt owing to the bank was held back.

The bank chose to withhold the partial releases from the plaintiffs and charged interest instead.

As to the securities charged to the bank it was contended that they have enhanced in value since the lands had been developed.

It was in evidence that land value has gone up in price from $17,000 in 1957 to $100,000 per acre in 1966. The acreage of the land in question is 8.72 acres. It therefore more than covers the two overdrafts.

Counsel for the defendant in his argument before the court contended that even assuming that they have proved the alleged agreement/assurance, such agreement/assurance is not sufficient in point of law to sustain the action.

The plaintiffs had pleaded that they embarked upon their development enterprise pursuant to the assurance of Dato Wee that the defendant could give him (*i.e.* the first plaintiff) the finance and support.

Such general statement cannot be treated as a binding contract, by reason of the uncertainty of its terms.

There was in the first place no limit put to the liability of the defendant to advance the plaintiffs. Such an obligation should have been expressed in precise and clear terms before any court would enforce it.

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* "Transferor | Transferee | Grant of State Land | Loan (B.H. Dept. Ltd.)

Ong Tiaw Kok and Ong Tiaw Sian	Lim Tiang Leong	Lot 1009 Block 10 KCLD	$24,300.00 (S.P. $ 2,029,00)
Ong Tiaw Kok and Ong Tiaw Sian	Chee Thien Siak	Lot 1002 Block 10 KCLD	$13,000.00 (S.P. $ 1,027.00)
Ong Tiaw Kok and Ong Tiaw Sian	Chin Lim Chong	Lot 1045 Block 10 KCLD	$15,000.00
Ong Tiaw Kok and Ong Tiaw Sian	Vong Vui Lok	Lot 1005 Block 10 KCLD	$15,000.00
Ong Tiaw Kok and Ong Tiaw Sian	Lai Ki Siew	Lot 1008 Block 10 KCLD	$10,000.00
			$77,300.00

Payment of the above sum is assigned to Bank from BORNEO HOUSING DEVELOPMENT LIMITED (These are the lots pending discharge)."

It was pointed out that at the time the alleged assurance was given the plaintiffs were already in debt to the bank to the extent of $110,000 secured on lands by the first charge.

The bank agreed to release 8 lots and there was no general agreement as alleged in paragraph 6 of the statement of claim.

The consideration moving from the plaintiffs in respect of the purported releases is alleged to be "upon payments of certain sum out of the purchase price of sub-divided lots which were sold".

Again in March, 1967, in consideration of the plaintiffs not drawing any money out of Ong Construction Company Account, the defendant stipulated that for payment of every $8,000 the defendant would release one lot named by the plaintiff and further pleaded by plaintiffs in the further and better particulars.

It was also pleaded by the plaintiffs that Dato Wee stated that so long as the plaintiffs did not withdraw any further sums from the Ong Construction Company Account, the defendant would release any lot nominated by the first plaintiff upon the payment of $8,000 for each lot nominated.

The point was taken that there are thus two different considerations pleaded in respect of the two allegations of entitlement to partial releases by the plaintiffs.

The first consideration refers to payment of sums out of the purchase price of lots sold.

The second consideration refers to the abstention of the plaintiffs from making further drawings on No. 2 Account.

It is contended that the first consideration is not legal consideration. In February 1965 the plaintiffs were indebted to the bank in the sum of $110,000 the subject matter of the first charge. In addition Account No. 1 was opened in 1957 and became an overdraft. Overdraft including interest amounted to $167,033.60 on 30th September, 1966, when it was paid off out of Account No. 2.

Account No. 2 was opened on 31st October, 1963 and 31st December, 1964, it was overdrawn to the extent of $164,962.02, and in February, 1965, to over $200,000. Therefore any sum of $8,000 paid by the plaintiffs was payment made in discharge of an existing debt. Reference was made to the evidence of the secretary, Harry Tnay, where he said any sums realised from the releases was paid into Account No. 2 to keep down the unsecured debt.

On the authorities, such a payment is not legal consideration. Whilst it might amount to an equitable defence, by way of estoppel in appropriate cases, it cannot give rise to a legally enforceable contract

In so far as the second consideration is concerned, the claim pleaded by the plaintiffs presupposes that they were entitled as a right to go on drawing on their No. 2 Account notwithstanding the fact that it was heavily overdrawn in March 1967.

Reference was also made to *Brooks and Co.* v. *Blackburn Benefit Society,*(11) which is authority for the proposition that a banker is under no obligation to allow the plaintiffs as customers to overdraw, and if the defendant had felt strongly about it he had in his power to determine the overdraft facilities summarily (see *Parkinson* v. *Wakefield and Co.*(12)).

The defendant had agreed to release 8 lots as stated in the particulars but it was argued that there was no general agreement to release the sub-divided lots with completed buildings thereon from the said charge upon payment of certain sums out of the purchase price of the sub-divided lots which were sold

Such payment it is said is not legal consideration and cannot give rise to a legally enforceable contract.

Even if it was established in evidence that Dato' Wee had agreed to the releases it was suggested that the plaintiffs gave no consideration for such agreement, since they had no right to increase their indebtedness under the overdrafts, either under Account No. 1 or Account No. 2.

A valuable consideration in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given suffered, or undertaken by the other. *Currie* v. *Misa.*(13)

Again, it was pointed out that performance of an existing duty owed to a promisor (*i.e.* the defendant in this case) is unreal consideration. *Anson* on Contract, 23rd Edition page 97. *Stilk* v. *Myrick.*(14)

Counsel for the defendant also drew the attention of the court to the decision in *Vanbergen* v. *St. Edmund's Properties Ltd.*,(15) where it was decided that a promise to pay to a creditor a sum which the debtor is already bound to pay by law does not provide any consideration to support a valid contract.

There was here no evidence of any consideration moving from the plaintiff. That being so the agreement/assurance of the defendant was really a *nudum pactum* and is not enforceable at law.

Counsel for the defendant has also sought to rely on the case of *Central London Property Trust Ltd.* v. *High Trees House Ltd.*(16) in which Lord Denning decided that a promise intended to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply, but Birkett L.J. in *Combe* v. *Combe*(17) has made the point that the *High Trees'* case enables a person to use it as a shield and not as a sword.

I must pause here for a moment and draw attention to paragraph 11 of the statement of claim which reads:

"11. In breach of the agreement/assurance aforesaid the defendant on 26th September, 1967, gave notice to the plaintiffs demanding payment of the sums and interests alleged to be due under the said charges and refused to release the lots which have been sold by the plaintiffs on payment of $8,000 for each lot."

On the other hand, paragraph 10 of the defence as amended reads as follows: —

"10. As to paragraph (11) of the statement of claim the defendant admits having given notice on 26th September, 1967, as alleged and that it commenced proceedings in this Honourable Court by Originating Summons dated 8th day of February, 1968, to recover the sums due to the defendant under the said two charges, but denies breach of any agreement/assurance." (Underlining is mine).

On the record, it seems to me that these proceedings were commenced in the first instance by the defendant by giving the notice dated 26th September, 1967, which was followed by originating summons dated 8th February, 1968.

It necessarily follows, as it seems to me that these proceedings now before the court was in effect commenced not by the plaintiffs but by the defendant and according to *Combe* v. *Combe*[17] (cited by counsel for defendant) the plaintiffs are using it not as a sword but as a shield and that this is precisely what has been done here.

In the case of *Central London Property Trust Ltd.* v. *High Trees House Limited*[16] the head-note reads as follows:

"That where parties enter into an arrangement which is intended to create legal relations between them and in pursuance of such arrangement one party makes a promise to the other which he knows will be acted on and which is in fact acted on by the promisee, the court will treat the promise as binding on the promisor to the extent that it will not allow him to act inconsistently with it even though the promise may not be supported by consideration in the strict sense and the effect of the arrangement made is to vary the terms of a contract under seal by one of less value."

Again, in the case of *Combe* v. *Combe*[17] at page 220, Lord Denning said:

"The principle, as I understand it, is that, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only by his word."

and at page 224 Lord Birkett said:

"With regard to the second point, I think that the description given by Mr. Kee to the doctrine enunciated in the two cases to which Denning, L.J., has referred, as one to be used as a shield and not as a sword, is very vivid."

and further down at page 225 Asquith L.J. said:

"What that case decides is that when a promise is given which (1) is intended to create legal relations, (2) is intended to be acted upon by the promisee, and (3) is in fact so acted upon, that promisor cannot bring an action against the promisee which involves the repudiation of his promise or is inconsistent with it."

The legal position is also set out in *Halsbury's* Laws of England, Volume 8, 3rd Edition at page 113.

"197. *Nudum pactum.*

It seems that where a promise is given without consideration but is intended by the promisor to affect an existing contract between him and the promisee, and is intended to be acted upon by the promisee, and is in fact so acted upon, such a promise may be set up as a defence by the promisee in an action by the promisor to enforce the original contract; but it cannot be sued on as a separate cause of action by the promisee."

(See *Central London Property Trust, Ltd.* v. *High Trees House Ltd.*,[16] as explained in *Combe* v. *Combe*,[17] *Robertson* v. *Minister of Pensions*.[18])

Therefore assuming there was no consideration we have the situation where the defendant promised the plaintiffs which was in fact acted on and is binding upon the defendant, notwithstanding the absence of consideration.

It was admitted by counsel for the defendant that for 66 months and in terms of period of years it is 5½ years, no statements of account were furnished to the plaintiff although his solicitors has written for them.

In the circumstances it seems to me that it was not possible for the plaintiffs to ascertain the true position. It was on advice of his counsel (correctly if I may say so) that he had settled the account and had done so without prejudice.

In my opinion nothing that the plaintiffs have done in settling the accounts could have justified the defendant in thinking that the matter has been settled nor in my judgment did the plaintiffs give such an impression.

It seems to me however on the evidence of the chartered and certified accountant (PW2) that the interest charged by the bank is wholly inconsistent with much that was alleged to have been charged by Harry Tnay (DW1) himself (with which I have earlier made a finding as to interest).

The request for the supply of the rest of the accounts by the plaintiffs was ignored although the state of accounts withheld from the plaintiffs can hardly be judged without reference to those accounts.

I must also refer to an argument of the defendant based upon the fact that the accounts furnished to the plaintiffs was balanced every year and the plaintiffs raised no objection, and therefore it was an account stated which could not now be questioned.

But at the time the accounts were balanced the true amount of interest charged had not been discovered; and when the discovery was made I do not see any reason why the items debited should not be questioned.

Return of pass-book without objection does not amount to a settlement of account as between the customer and the bank in respect of those entries. See *Kepitigalla Rubber Estate Ltd.* v. *National Bank of India, Limited*[19] and *Chorley* on Law of Banking under the headings of "Mistakes to Customer's Detriment" and "No Duty to examine".

It never entered the heads of the plaintiffs even to enquire about the 5½ years statements of account which were not supplied, until sometime later.

I am satisfied that the first plaintiff was not told by the defendant and did not learn of the interest on clean loans, until he received a notice to pay up.

That this is the true view seems to me to be borne by the fact that he did not ask for the 5½ years statements of account which the bank failed to furnish the plaintiffs, not until sometime in the early part of 1969.

Counsel for the plaintiffs applied at the outset of the hearing for the production of 66 months of statements of account referred to in paragraph 12 of the statement of claim.

Counsel for the defendant submitted that it would be a waste of time if the court in its judgment came to the conclusion that the interest as charged was in fact correct.

The court accordingly refused application by counsel for the plaintiffs at that stage.

Now according to counsel for the plaintiffs the statements of account for the 66 months were requested from counsel for the defendant on 21st March 1969 and again on 9th April 1969 and 16th January 1970.

The answer given by counsel for the defendant at the outset of the trial was that there was no obligation to supply since the account has been settled on 26th June 1968.

I am quite unable now upon the evidence to accept that argument.

The contention of the defendant seems to me to have overlooked the fact that on 14th March, 1968 when the writ of summons was filed and issued (*i.e.* a little over 3 months before the date when the accounts were alleged to have been settled by the plaintiffs) the plaintiff had by paragraph 12 of his statement of claim asked the defendant to do so, but the defendant had ignored his request.

Why then was the legitimate request to supply the remaining accounts ignored by the defendant?

On this I would like to quote some observations of the Lordships of the Privy Council on section 114(g) of the Indian Evidence Act which is *in pari materia* with section 116(g) of Sarawak Evidence Ordinance (Cap. 54) in *Murugesam Pillai* v. *Gnana Sambandha*[20] at page 8:

"... but with regard to the parties to the suit it is, in their Lordship's opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the court the written evidence in their possession which would throw light upon the proposition. The present is a good instance of this bad practice...."

Then in *Rameshwar Singh* v. *Bajit Lal Pathak and Others*[21] at page 99 their Lordships made the following remarks:

"Their Lordships, in agreement with the High Court, consider that the excuses made by the defendant for the non-production of these documents are unsatisfactory and unreliable, and, like the learned judges of the High Court, they consider that their non-production is due to the fear that, if produced, they would either establish the plaintiff's claim, ..."

I have heard no arguments upon the question whether an adverse inference ought in the circumstances to have been inferred or not, and I refrain from expressing an opinion upon that aspect of the matter.

I am further of the view that the plaintiffs in those circumstances settled the accounts without prejudice otherwise the interest would be staggering by the time the judgment (assuming that decision is entered against him) is given.

The first plaintiff gave his evidence in a straightforward manner and I consider him to be an honest and truthful witness and I accept his evidence. There is no doubt in my view and I am satisfied that the plaintiffs embarked on the development of the housing estate on the faith of the representation and assurance given by the defendant which I hold and find as a fact. I should add with reference to the housing enterprise that the plaintiffs placed full reliance on the defendant in all matters financial bearing in mind their close family relationship.

It is the defendant's contention that as the plaintiffs have paid the capital and interest claimed by the defendant, the accounts between the parties have been settled and they are estopped from opening the settled accounts.

It is perhaps right that I should point out that an interlocutory application to amend the defence to include the plea of estoppel on the grounds that the plaintiffs have discharged their liabilities to the defendant on 26th June, 1968, was refused by another judge in chambers on 7th November 1969.

The question arises whether the plaintiffs have an enforceable right to partial releases when payments of $2,000, $3,000 or $8,000 were made in respect of an individual lot.

Now, having considered all the evidence in this case and upon an examination of the cases cited by both counsel, it is my view and I find as a fact on the balance of probabilities that there was a general agreement to partial releases of the lots upon the payments stipulated above, namely $2,000, $3,000 or $8,000 as the case may be.

I am also of the view and I hold as a fact that the plaintiffs acted on the representation/arrangement and entered into agreements with prospective purchasers for sale of the lots and buildings thereon.

I therefore direct that an enquiry be taken before the Registrar, High Court to determine the amount of the rate of interest overcharged by the defendant and to credit the amount to Ong Construction Company therewith by way of adjustment, and that the 66 months statements of account be supplied to the plaintiffs for this purpose.

One other matter falls to be mentioned. Whereas the parties agreed that a meeting took place, they differ as to dates *i.e.* March, 1967, or September, 1966. The significance of one or the other has not been argued by counsel, nor can I find any relevance in them.

I also order the payment of damages in the sum of interest the plaintiff would have saved if the defendant on his part had adhered to the terms of the agreement.

There will therefore be judgment for the plaintiff with costs.

Judgment for the plaintiffs.